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*Via Electronic Mail*

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\*NOT ADMITTED IN D.C.

The Honorable Kenneth Salazar  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, NW  
S 4141-MIB  
Washington, D.C. 20240  
Attn: Ms. Mary Milam

Re: Comments regarding the Department's draft Tribal Consultation Policy

Dear Secretary Salazar:

On behalf of the following seventeen federally recognized Indian tribes and Alaska Native Villages – the Rosebud Sioux Tribe, the Eastern Shoshone Tribe, the Turtle Mountain Band of Chippewa Indians, the Oglala Sioux Tribe, the Assiniboine and Sioux Tribes, the Shoshone-Bannock Tribes, the Standing Rock Sioux Tribe, the Three Affiliated Tribes, the Shoshone-Paiute Tribes, the Tanana IRA Native Council, the Native Village of Eyak, the Chickaloon Village Traditional Council, the Healy Lake Traditional Council, the King Island Native Community, the Egegik Village Tribal Council, the Nome Eskimo Community, and the Naknek Village Council, we respectfully submit these comments regarding the Department of the Interior Policy on Consultation With Indian Tribes ("draft Policy").

## **I. Introduction**

These comments are submitted in response to the Department of the Interior's ("Department") notice published in the Federal Register on May 17, 2011, announcing the beginning of a 60-day public comment period on the Department's draft Policy. 76 Fed.Reg. 28,446 (May 17, 2011). These comments also support and supplement the comments provided by us on behalf of the Tribes listed above ("March Comments") in response to the January 14, 2011 Dear Tribal Leader letter that opened a period for tribal comments on the first draft of the Department's Policy on Consultation with Indian Tribes ("January draft Policy").

We commend the Department for making a substantial effort to obtain tribal input on how to improve consultation with tribal governments, and continuing to work to develop the best possible consultation policy to promote effective government-to-government relations between the Department and Federally recognized Indian tribes and Alaska Native Villages (hereafter jointly referred to as “Indian tribes” or “tribes”). This effort must consider and incorporate, wherever reasonable, the ideas, concerns and consensus recommendations expressed by tribal governments throughout this outreach and consultation period. Based on the few changes that were made in the draft Policy, it appears that the Department has not yet incorporated many of the suggestions that were made by tribes during the tribal comment period. From our review, the new draft Policy made very few changes from the earlier draft consultation policy the Department released. Unfortunately, many of the changes that have been proposed by the Department are the removal of provisions that we supported as recognizing true government-to-government relations that embody the Federal government’s trust relationship with Indian tribes.

Below, we offer further comments to assist the Department revise its draft Policy to give full expression to a meaningful Tribal consultation policy. With the submittal of these comments, we renew the concerns and suggestions that were made in our March Comments, and supplement them with the Comments we set out below.

#### **I. The Draft Policy Removes Important Provisions That Represented Positive Steps Toward Improving Tribal Consultation**

We commend the Department for keeping many of the guiding principles that support meaningful and effective Tribal consultation, particularly its requirement that Departmental officials who participate in consultation be “knowledgeable about the matters at hand, [ ] authorized to speak for Interior, and have delegated authority in the disposition of an action.” Draft Policy at 2.

We are also pleased that the Department continued to include its view that “[f]ederal consultation that is meaningful, effective, and conducted in good faith makes the Department’s operation and governance practices more efficient.” *Id.* We also agree with the Department’s new principle that the Department’s “Bureaus or Offices will seek and promote cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications.” *Id.* Such cooperation and participation between agencies is imperative for full, effective, and efficient implementation of Departmental programs – much time and money can be saved if agencies can work through and agree on issues at the forefront of program implementation.

As we stated in our last comments, we agreed with the Department’s view that tribal consultation is “a deliberative process that aims to create effective collaboration and informed decision-making where all parties share a goal of reaching a decision together and it creates an opportunity for equal input from all governments.” January Draft Policy at 1. Unfortunately, the Department’s alteration of this view has limited the principle to the point that equality between all governmental input may be lost. The draft Policy now currently states that tribal consultation is “a deliberative process that aims to create effective collaboration and informed decision-

making where all parties share a goal of reaching a decision together and it creates an opportunity for equal input from all *tribal* governments.” Draft Policy at 2 (emphasis provided).

We appreciate the Department’s decision to consider the input among all tribal governments equally. However, we want the policy to clearly state that the comments of tribal governments are considered at least on par with all over governmental comments, if not given more weight. The trust responsibility that the United States owes to federally recognized Indian tribes mandates no less.

Unfortunately, there are many positive provisions that were included in the previous draft Policy that have been removed in the current draft Policy. Regrettably, most of those provisions deal with communication between each of the Department’s Offices or Bureaus. We fail to see the wisdom in removing these provisions, since comprehensive, understandable, and continuous communication is the cornerstone of any affective consultation. For any consultation to be truly meaningful and to meet the spirit and obligation of the trust responsibility there must be effective communication between the Department and Indian tribes. The Department must support greater Departmental communication and memorialize such aspirations in a Tribal Consultation Policy if meaningful change is to actually occur in practice.

As in our previous comments, we fully support the Department’s commitment to open and transparent communication, see Draft Policy at 2, but we find it unfortunate that the framework for effective communication that was included in the previous draft (see January Draft Policy at 3) was removed. While we suggested that the previous draft Policy be drafted in a more logical structure and the “Communication” section seemed out of place where it was, removing all of the language that had been in that section removed important communication policies.

For example, language in the “Communication” section promoted “on-going communications concerning issues affecting Indian Tribes” following the initial notification of the opportunity for consultation. January Draft Policy at 4. Early and ongoing tribal consultation is necessary for full participation by tribes, maximizes the amount of meaningful input from tribes regarding a proposed agency action, and allows tribes to identify and comment on other issues that may arise during the consultation process. While the current draft Policy continues to require early tribal consultation, it no longer promotes the goal that consultation be continuous. If consultation is not continuous throughout the consideration, design, and implementation of the proposed Departmental action, tribal governments will not get the opportunity to comment on issues that will inevitably arise throughout the process. Indian tribes deserve to have their voices heard throughout the Department’s policy development process.

Another provision we regret was removed from the draft Policy is its suggestion that the Department avoid “impersonal forms of communication” with tribal governments, instead suggesting the use of meetings, telephone conversations, written notices, workgroups of tribal leadership, or regular gatherings of tribes. January draft Policy at 3-4.

Many Indian reservations and Alaska Native Villages are located at great distances from Department offices and urban centers. Given the state of broadband in many of these rural areas, many tribes and ANCs do not have reliable access to e-mail. Providing for many non-e-mail

based communication forms increases the likelihood that tribes will receive notice about proposed Departmental actions, and have the opportunity to fully participate. Avoiding impersonal forms of communication will improve the likelihood that tribal governments will fully participate. We are confident that reinstating the directive that Department personnel avoid impersonal forms of communication into the Tribal consultation policy will provide for increased tribal participation in consultation and result in more informed decision-making by the Department. Such a requirement simply reinforces a “best practice” that experienced and well respected Department officials already implement in their day-to-day routines.

## **II. Recommendations for Improving the Draft Department of the Interior Policy on Consultation with Indian Tribes**

We set forth below our recommendations for improving the draft Consultation Policy.

### **A. Recommendations on the Structure of the Draft Policy**

We appreciate the difficult job the Department faces when attempting to address many variations of tribal concerns in a singly Policy. While the first draft Policy proposes many positive measures that will affect and improve communication between Department agencies and Indian tribes, we fear that many of those measures will be lost in the confusing and inconsistent structure of the draft Policy. The draft Policy contains important guidelines and procedures for conducting tribal consultation, but they are buried under broad headings that give no feeling for how these guidelines and procedures relate to one another or which might be required.

To reduce confusion and increase the efficacy of your tribal consultation efforts, we recommend that the Department develop a concise and well-organized Consultation Policy that is easier for the Department and tribes to follow and that gives each party clear steps to meet the Policy’s requirements.

As we commented on the previous draft Policy, as currently written, the draft Policy still spreads related principles of tribal consultation across different sections of the document, but also groups a range of key consultation guidelines under the same subject headings. For example, the description of the Departmental activities appropriate for consultation – a component that requires significant discussion in any agency’s Consultation Policy – is located in the “Definitions” section of the Department’s draft Policy for the definition of the term “Departmental Action with Tribal Implications.” *See* draft Policy at 3. However, in the substantive body of the draft Policy, the Departmental actions that will actually trigger consultation are *briefly* referenced without further explanation of how a Departmental office determines that an action may have tribal implications. We believe that this structure makes it difficult for tribes to understand where in the process consultation will be triggered by the Department.

Furthermore, the current structure of the draft Policy makes it difficult to distinguish when each required action should take place, what the roles of Department officials should be throughout each stage of the consultation process, and what action is available to tribes throughout each stage. For example, the draft Policy discusses the process for tribal requests for

consultation in a section that may not be obvious to tribal officials – the “Consultation Guidelines” section (Sec. VII). The descriptions of the various roles of Department officials are scattered throughout the draft Policy, while some provisions relating to agency accountability are included in sections other than the “Accountability and Reporting” section. The stages of consultation, which should be the backbone of any consultation policy, are embedded within the “Consultation Guidelines” of section VII of the draft Policy. This section needs to be more prominent.

To make the Policy more coherent and logical, and to enable each participant to fully understand their respective roles and responsibilities through every step of the consultation process, we believe it is important to reorganize this policy so that all elements of the process are grouped together, and the roles of Department and Tribal officials are clearly defined within each stage of the process.

The Department could consider reorganizing the Policy chronologically, beginning with the initial planning stage and the initiation of tribal consultation, being sure to be very clear when Tribes may request consultation and the Department’s required response to that request. By being explicit and clear in the Policy, the Department could then organize the consultation requirements under the appropriate corresponding stage of consultation. For all other provisions, the Department should organize related principles and general guidelines together in relevant sections, such as “Roles and Responsibilities of Departmental Officials,” and “Agency Accountability and Performance Measures.”

## **B. Recommendations on Making Consultation Meaningful, Effective, and Efficient**

As we noted above, we commend the draft Policy for addressing the importance of meaningful participation by clarifying appropriate Departmental officials must participate in consultation, and that the “appropriate Departmental officials” are “Departmental officials [that] are knowledgeable about the matters at hand, are authorized to speak for Interior, and have delegated authority in the disposition and implementation of an action.” Draft Policy at 1-2. However, the Policy must clarify the extent to which these appropriate Departmental officials should participate in the consultation meetings. For example, the draft Policy states that “Department officials will *make the effort* to fully participate in the consultation process, ensure continuity, and demonstrate commitment to the process.” We believe that for effective consultation, it must be clear that appropriate Departmental officials will fully participate throughout the consultation process and that there will be continuity throughout the process. We take this opportunity to renew our suggestion that inconsistencies within the draft Policy relating to the participation of decision-makers must be made clear in the final Policy, and should explicitly clarify that every effort will be made to involve Department decision-makers in the most critical stages of consultation. *See* March Comments at 6-7. Meaningful consultation with Indian tribes requires that key decision makers hear directly from tribal representatives and grant themselves the opportunity and benefit of hearing from tribal leaders directly before Department policies are developed and receptiveness to change is more difficult.

The draft Policy directs Bureaus and Offices to seek and promote cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related

responsibilities regarding Departmental Action with Tribal Implications. Draft Policy at 2. We believe that this principle could be strengthened by requiring Department agencies and offices to be required to collaborate efficiently with state governments, along with other federal agencies, when executing programs under the jurisdiction of multiple governmental entities.

As we noted in our previous comments to the January draft Policy, the transportation arena shows how such intergovernmental collaboration can help such multi-jurisdictional programs run more efficiently and effectively. The Indian Reservation Roads (IRR) Program is jointly administered by the Bureau of Indian Affairs and the Federal Highway Administration within the Department of Transportation. Tribes have long sought to secure simplified award instruments that they can enter into with states to obtain and expend Federal-Aid and other federal funds administered by state governments on eligible tribal transportation projects. However, states often impose unacceptable terms on tribes as preconditions to the receipt of these funds by Indian tribes, such as waivers of tribal sovereign immunity from suit, indemnification clauses, and adjudication of claims in state courts.

By including state governments in consultations with Indian tribes on federal actions that take place in such programs, many of the issues that currently preclude cooperation between state and tribal governments could be worked through in this process, clearing the way for these programs to be fully and efficiently implemented.

We also believe that the training section (Sec. V.) should be improved. We commend the Department for recognizing that training both the federal governmental employees and tribal employees in the Department's duties concerning tribal interests and the legal trust obligation of the Federal-Tribal relationship will strengthen the understanding of the relationship and increase commitment to the consultation process. However, the draft Policy should offer more logistical specifics with regard to how training should work. For example, it does not state how often training should take place.

The legal and trust relationships between federal and tribal governments are important, complicated, and, unfortunately, not widely known by people who do not spend significant time around Indian Country. Education in these relationships is vital to maintaining them. The understanding of and respect towards traditional cultures and governments are imperative to truly understanding the role of Departmental officials in these relationships. As with many employers, there is a high turnover of federal employees – it is important that new employees, or those that move on to higher offices within the Department, be trained as early as possible to maintain continuity in the level of education regarding the Federal-Tribal relationship within the Department.

Therefore, in addition to requiring regular training, it is equally important that this Policy take the opportunity to make such training mandatory for employees that would operate in the capacity of “appropriate Departmental officials” during a consultation.

We also believe that Indian tribes and Alaska Native Villages should play a significant role in developing any training programs for Department employees. We have found that internal training activities in the federal government are only as affective as the amount of

knowledge and preparation invested in such educational programs. Accordingly, to further an “understanding of traditional Indian cultures and governments,” the Department should make such training mandatory for all Department personnel who interact with tribes, while also requiring the involvement of tribal members, academics, or other tribal experts and advocates. To carry out training concerning the “legal trust obligation of the Federal-Tribal relationship,” we recommend that the Department’s Office of the Solicitor be integrated into the Department’s training program.

### **C. Recommendations on Improving the Consultation Process**

The draft Policy’s descriptions in the Consultation Guidelines section (Sec. VII) of the stages of consultation are a useful start in providing consistency in tribal consultation throughout all Department agencies and offices. However, we recommend that the Department clarify this section, and include more specificity on the core consultation efforts that will occur in each stage. We also recommend that the Policy include minimum timelines for each stage.

With respect to the early stage of tribal consultation, the draft Policy states that a “Bureau or Office must notify the appropriate Indian Tribe(s) of the opportunity to consult when considering a Departmental Action with Tribal Implications.” Draft Policy at 7. It further states that “[e]ach Bureau or Office will consult as early as possible when considering a Departmental Action with Tribal Implications. *Id.* at 10. This guideline does not offer guidance on when in the “consideration” of the Departmental Action such notification should take place. We urge the Department to state when an agency should initiate consultation while considering a federal action with tribal implications.

We further urge the Department to describe the role of tribes in the initial planning stage. As currently written, Bureaus or Offices “may conduct a meeting or other forms of interaction with Indian Tribes in order to receive and evaluate comments received as part of the Initial Planning Stage.” *Id.* However, if the Bureau or Office does not conduct such interaction, there is no information on what role the tribes would have during this stage. Finally, we urge the Department to show how initial planning activities may determine whether more exhaustive tribal consultation is ultimately appropriate.

We also suggest that the role of the Department be clarified when tribes request consultation. As it is currently written, the draft Policy states that the Tribal Governance Officer “or appropriate representative will confirm receipt of a request for consultation from a Tribal Official. When the request is directed to the TGO, the request is to be forwarded to the appropriate Bureau or Office. The TGO or appropriate representative will treat an official request for consultation in an expedited fashion and respond in writing, using the most expedient methods to communicate to the Tribe, that the Department has received their request.” *Id.* at 10. We believe that the Policy should be changed to ensure that the Department will initiate consultation upon the receipt of such a request.

As we suggested in our January comments, we recommend that the Policy be revised to provide that “Department agencies shall initiate consultation in response to a written tribal request when the agency activity that is the subject of the request may affect Indian tribes

broadly or a particular tribe significantly, and the agency activity has not previously been the subject of tribal consultation.” January Comments at 6. This change is important because it ensures that tribal consultation requests are not meaningless, but will result in Department consultation on proposed Department activities that might not be interpreted as ones that would broadly affect tribes, but will likely impact a tribe or small group of tribes.

Finally, we would like to continue to support the suggestions that were made in our previous comments. Particularly, we renew our suggestion that the Department add a provision to the draft Policy to encourage its agencies to evaluate the use of waivers of regulatory requirements as situations warrant, so that regulatory impediments to effective tribal administration of programs and services may be waived during the lengthy statutory and regulatory change period. *See id* at 9. We further urge the Department to recognize in its Consultation Policy that there are times where consultation is required, but where privacy and protection of information are also of the utmost priority. In these instances, particularly with regard to religious practices or tribal customary law, the Consultation Policy should guarantee that culturally-sensitive information will not be made public, to the extent permitted by law. *Id.* The Policy should make clear, on all levels, that traditional and cultural understanding and respect are of utmost priority in all aspects of the Federal-Tribal relationship.

### **III. Conclusion**

The success of the Department of Interior’s programs is wholly dependent on the decisions your agencies and offices make. It is important that these decisions be made with utmost care, consideration, and with full information. Full and meaningful tribal consultation is imperative to the success of tribal programs, and for full functioning of all Department programs that impact tribes. We appreciate the opportunity to submit these comments for the Department’s consideration on behalf of our tribal clients.

Respectfully Submitted,

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